Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

LESLIE G. BOWEN, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not yet reported. It is set out in full in the record (R. 607-618).

II.

JURISDICTION.

1. The date of the judgment to be reviewed is February 21, 1946 (R. 618).

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are Section 240(a) of the Judicial Code, the Act of March 3, 1911, Ch. 231, Sec. 240, 36 Stat. 1157, as amended 43 Stat. 938 (28 U. S. C. A., Sec. 347(a)); the Act of March 8, 1934, Ch. 49, 48 Stat. 399, as amended 48 Stat. 926 and 49 Stat. 1921 (18 U. S. C. A., Sec. 688); Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt of the Supreme Court of the United States, promulgated by this Court May 7, 1934, as amended; and that provision of Rule 38(5)(b) of the Rules of the Supreme Court of the United States, which provides that this Court may grant certiorari where a Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court."

3. After the jury had deliberated for some time, it advised the Court by written message that it was deadlocked 11 to 1 (R. 595). The Court thereupon called the jury into the court room and stated that he assumed they had not reached a verdict, to which the foreman replied in the affirmative. The Court immediately gave a supplementary instruction to the jury, stating that the case should be decided, that the minority should consider the opinions of the majority and that they should consider whether the petitioner was not guilty of some count. To this action the petitioner excepted and moved that the jury be discharged, which motion was denied. Upon appeal, the petitioner assigned as error the foregoing action of the trial Court. The Court of Appeals sustained the trial Court and affirmed the conviction.

4. The judgment of the Circuit Court of Appeals upon the foregoing question is in conflict with applicable decisions of this Court in *Burton* v. *United States*, 196 U.

S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345.

III.

STATEMENT OF THE CASE.

The petitioner has stated the case in the Summary Statement of the Matter Involved, Part A of his foregoing Petition for Certiorari, which statement is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals for the Eighth Circuit erred in sustaining the trial Court's refusal to discharge the jury after giving a supplementary instruction to the jury urging agreement and directing the jury to consider whether the petitioner was not guilty of some count, immediately after the jury had voluntarily, by written message, advised the Court it was deadlocked 11 to 1 and the Court had verified the message by the general question that he assumed they had not reached a verdict, to which the foreman replied in the affirmative.

V.

ARGUMENT.

The decision of the Court of Appeals sustaining the trial Court's coercive instruction to the jury after the Court was advised of the jury's numerical division, is in conflict with applicable decisions of this Court.

After the trial Court had charged the jury and the jury had deliberated for ten or twelve hours, the foreman of the jury sent a written communication to the Court (R. 591) which the Court told petitioner's counsel stated that the jury was hopelessly deadlocked. It later appeared that the jury's message actually read "This jury is deadlocked on a 11 to 1 verdict. F. B. Alderson, Foreman" (R. 595). The Court thereupon called the jury into the courtroom and stated that he assumed they had not reached a verdict, to which the foreman replied in the affirmative. He then gave the supplemental charge appearing at R. 591, 592 and 593, and which in substance advised the jury that they should take proper respect to each other's opinions and that if the larger part of the panel were for conviction, a dissenting juror should consider whether his doubt was reasonable; that if a majority were for acquittal, the minority should consider their judgment, combined with a direction to consider whether the defendant was not guilty and a further direction to render a verdict of guilty in the event they found a defendant guilty. To this charge the petitioner excepted and moved that the jury be discharged on the ground that the charge invaded the province of the jury, was coercive and was an invitation to render a verdict of guilty (R. 593).

The foregoing supplementary charge to the jury, given by the Court after he was advised that the jury was divided

eleven to one, and after the jury knew that the Court was so advised, was coercive, and the petitioner's exception and motion to discharge the jury should have been sustained. The Court of Appeals sustained the trial Court. Its action was contrary to applicable decisions of this Court in *Burton* v. *United States,* 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States,* 272 U. S. 448, 71 L. Ed. 345.

The supplemental charge is almost verbatim the charge given in *United States* v. *Allis,* 73 Fed. 165, l. c. 183 (1893), affirmed on appeal, *Allis* v. *United States,* 155 U. S. 117, 39 L. Ed. 91 (without consideration of this charge, however). The Allis case was followed by *Allen* v. *United States,* 164 U. S. 492, 41 L. Ed. 528 (1896), from which the authority for the instruction is derived, sometimes called the "Allen instruction."

The petitioner is not concerned with the propriety of the foregoing instruction, nor modifications of it, standing alone and in a proper case. In any case such an instruction, after the jury has deliberated for a period of time, is in a sense coercive. It is given for that purpose—an endeavor by the court to exert pressure upon the jury to arrive at a verdict. To a lay juror this instruction, even standing alone, no doubt often creates the impression, erroneous or not, that the kind of verdict desired is a verdict of guilty. However, the courts usually hold that this instruction is not coercive in a sense requiring reversal, where it is given at a proper time, properly safeguarded, and unattended by factors which render it prejudicial. In the instant case there were other factors which did render the instruction coercive, and prejudicial. The jury had advised the Court they were deadlocked at eleven to one. He had verified this information—cautiously, it is true, but there could be no question to what he was referring. He knew how they stood and they knew he knew.

Inquiries by courts as to the numerical division of juries were condemned by this Court in *Burton* v. *United States,* 196 U. S. 283, 49 L. Ed. 482 (1905). In this case, after deliberating for some time, jury was brought back to the court room. The Court indicated he had received a letter from them, and in connection with it he asked the foreman how they were divided, stating that he did not want to know how many stood one way and the other way. The foreman stated that they stood 11 to 1 and the Court stated that *he gathered that from the communication.* He then gave the jury the instruction in the *Allen* case (196 U. S. 305). Counsel then requested that he instruct the jury that the requests of the defendant which were given in his main charge were as much a part of the Court's charge as that which he read as emanating from the Court itself. This he refused to do. In connection with this action, and also in connection with his inquiry as to the division of the jury, this Court stated l. c. 196 U. S. 307:

> "Balanced as the case was in the minds of some of the jurors, *doubts existing as to the defendant's guilt in the mind of at least one,* it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * *A slight thing may have turned the balance* against the accused under the circumstances shown by the record, and he ought not to have longer remained burdened with the characterization of his requests to charge, made by the court, * * *
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> "We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be

material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and *we do not think that the proper administration of the law requires such knowledge* or permits such a question on the part of the presiding judge" (Italics supplied).

The only difference between the *Burton* case and the present case, upon the question under discussion, is that there the Court verified the communication he had by asking the jury if it were correct, and here the Court after receiving the message stated he assumed they were unable to agree, and the foreman said that was correct.

After the *Burton* case, the appellate courts disagreed whether it was authority for holding the inquiry alone was prejudicial. Finally the conflict was resolved by the case of *Brasfield* v. *United States*, 272 U. S. 448, l. c. 449, 71 L. Ed. 345 (1926), where it was held, l. c. 272 U. S. 449:

"The jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically, and was informed by the foreman that it stood nine to three without indicating which number favored a conviction.

"In *Burton* v. *United States*, 196 U. S. 283, 307, 49 L. Ed. 482, 490, 25 Sup. Ct. Rep. 243, where a conviction was reversed on other grounds, this court condemned the practice of inquiring of a jury unable to agree, the extent of its numerical division, although a response indicating the vote in favor of or against conviction was neither sought nor obtained. This court then said (p. 308): 'We do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge.' * * *

"We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned."

The conflict of the decision of the Court of Appeals upon the question under consideration with the decisions in the *Burton* and *Brasfield* cases, is clear. In those cases, the condemnation of this Court was directed against the coercive effect of such an inquiry standing alone, that is to say, the coercive effect arising from the fact that the Court knows how the jury stands and the jury knows that he knows. How much more coercive upon the jury must it be when the Court is advised in writing of the numerical division of the jury, recalls them to the court room, states that he assumes that they have not reached a verdict (which remark could not possibly refer to anything except the message), the foreman replies in the affirmative and the Court thereupon gives a coercive instruction, which of itself has been often criticized.* The

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*Indeed, the Court which rendered the decision here, said, with reference to this type of instruction in *Nick et al. v. United States*, 122 Fed. 2d 660 (C. C. A. 8th, 1941), l. c. 674:

rule of the *Brasfield* case, contrary to the holding of the Court of Appeals, does not need to be extended to cover this situation. The rule of the *Brasfield* case extends beyond the boundaries of the question here presented.

The Court of Appeals in passing upon the applicability of the *Burton* and *Brasfield* cases stated (R. 616) that it was asked to expand the rule of the *Brasfield* case and to hold that if the foreman of a jury without any inquiry informs the Court that the jurors stand 11 to 1, reversible error is committed, or that in any event, the trial judge must not give any supplemental instruction to the jury. That is not the application which the petitioner urges the *Brasfield* case has to the facts here at issue. When a message of this sort is received, the Court may certainly and with propriety advise the jury that it is improper to send such information and for them to continue their deliberations. It might not then be improper at a later stage and after further deliberation, for the Court to give some further instruction depending on circumstances, and making clear that there is no reference to any message. But, where the Court is advised of the numerical division of the jury, *verifies* the information, and *immediately* directs the minority to consider the opinions of the majority, such action is squarely within the reason upon which the condemnation in the Brasfield case is based.

"There have been criticisms of this general character of instruction in several cases cited by appellants. It seems to us any vice in this kind of statement depends upon the situation at the time it is given and upon the language used by the court. The objection is, of course, that such character of instruction may have coercive effect upon jurors. *If such statement is made in the face of an existing disagreement in the jury it is quite evident that its entire force would be felt as applying to an existing situation which had developed. Language which might be innocent if uttered before submission of the case to the jury might be regarded as harmful if applied to a specific existing disagreement*" (Italics supplied)

The Court of Appeals was not entirely satisfied with the logic of its position with reference to the alternatives offered the trial judge. Later (R. 617) it stated the jury had thirty-four issues of fact to decide, that is, there were three defendants, thirteen counts were submitted against two of them and eight counts against the third. The Court then observed:

> "We think it is safe to say that to any competent and experienced trial judge, the foreman's note would mean nothing more than that the jury had been unable to agree on all issues and were split eleven to one on some issue. The note reasonably could not be taken to mean that the jurors were divided eleven to one on every issue submitted."

We do not believe that the foreman's note would have had such meaning. The petitioner was charged with devising a fraudulent scheme, the same scheme was charged in each count, which were merely charges of various uses of the mail in furtherance of the scheme. The use of the mails as charged in all of the counts was admitted (R. 584). The only question was whether the mailings were done in pursuance of the same fraudulent scheme. The message of the jury, in the light of the facts, or of common forensic experience, could have meant nothing except that the jury was divided 11 to 1 on the general proposition of guilt of devising a fraudulent scheme, and doing various things to further it. In the present case, the trial court did not first inquire as to the division, he was told. But precisely the same harm was done here as if he had made the initial inquiry.

The appellee in the Court of Appeals contended that it was the *public* disclosure of the jury's division which this Court holds works the harm. It is submitted that the manner of the disclosure has nothing to do with the ques-

tion at issue. After the judge is possessed of knowledge of the jury's numerical division, no matter how he acquires it, and the jury knows he knows, anything the judge does will be interpreted by the majority on the jury as supporting their position, and by the minority as casting the weight of the court's influence into the scales against them. Here the Court, after receiving the message, and verifying it, instructed the jury that "a dissenting juror should consider whether a doubt in his own mind is a reasonable one" and that, "*in order to acquit*"—not "in order to convict"—*they must find the defendant not guilty of any of thirteen counts,* and if they found him guilty of *any*, they "*should return a verdict of guilty*" (R. 592). Under the circumstances, how could this have been anything but a ready tool for the majority to impress a dissenting juror with the argument that the court was demanding a verdict of guilty? How can it be contended that this was not "A slight thing (which) may have turned the balance against the accused" within the condemnation of this Court in the *Burton* case, or the bringing to bear of an "improper influence upon the jury" condemned in the *Brasfield* case?

The Court of Appeals stated that if a new trial had been granted there would not have been "the slightest assurance that a second trial would benefit anyone" (R. 618). The question presented to the Court was not whether a new trial would benefit anyone. The question was whether error was committed in the trial of the case before it. The conviction of the appellant depended upon establishing his guilty intent. The proof of that intent was circumstantial, and the evidence was conflicting. He had a right to have the question of his intent decided by the unanimous agreement of a jury of twelve men, uninfluenced by any outside pressure of any kind or degree. That right, under the circumstances here, this Court has pre-

served to him in its decisions in *Burton* v. *United States*, 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345. That right was denied him by the judgment of the Court of Appeals.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari, and thereafter reviewing and reversing said decision.

Respectfully submitted,

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